

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2013-01ST
October 4, 2016

NOTICE: Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the department's official position concerning a specific issue.

ISSUES

Sales and Use Tax - Cloud Computing and Related Services

Authority: [IC 6-2.5-1-24](#); [IC 6-2.5-1-26.5](#); [IC 6-2.5-1-27](#); [IC 6-2.5-1-27.5](#); [IC 6-2.5-1-28.5](#); [IC 6-2.5-2-1](#); [IC 6-2.5-2-2](#); [IC 6-2.5-4-1](#); [IC 6-2.5-4-6](#); [IC 6-2.5-4-16.4](#); [45 IAC 2.2-1-1](#); [45 IAC 2.2-4-2](#); Streamlined Sales and Use Tax Agreement (Oct. 8, 2014)

A taxpayer ("Company") is seeking an opinion as to whether Company's products are services that are not subject to the Indiana sales and use tax when sold to clients located in Indiana. Specifically, Company seeks a ruling regarding the following:

1. Are the hardware and software Company purchases, leases, or licenses from third parties for use or consumption and not for resale?
2. Is Company's Cloud Collaboration Service Offering a nontaxable service and not a lease or license of hardware or software subject to Indiana gross retail tax? Alternatively, if not a nontaxable service, is the Cloud Collaboration Service Offering exempt from gross retail tax because the transfer of software to customer is electronically delivered?
3. Is Company's Cloud Collaboration Service Offering a nontaxable telecommunication service?
4. Are the services provided by Company's Cloud Collaboration Service Offering provided in Illinois?

STATEMENT OF FACTS

Company is an Illinois corporation. Company provides the following facts regarding its request for a revenue ruling:

[Company] is a leading multi-brand technology solutions provider to business, government, education and healthcare customers in the U.S. and Canada, providing comprehensive and integrated solutions for its customers' technology needs through its extensive hardware, software and value-added service offerings.

...

[Company] offers a cloud-based service offering (the "Cloud Collaboration Service Offering" or the "Offering") to customers nationwide. The Cloud Collaboration Service Offering will provide certain cloud-based applications and related services (the "Cloud Collaboration Services" or the "Services") that support a customer's telecommunication equipment, including its voice, video, messaging, presence, audio, web conferencing, and mobile capabilities. . .

Overview of the Cloud Collaboration Service Offering

Generally, a business's phone systems, computers and other telecommunications equipment utilize various software applications and hardware in order to operate and function in the manner necessary for the business's needs. For instance, although a business may have a telecommunications provider that provides it with telephone lines to make outgoing and receive incoming calls, the business will need hardware and software that internally instruct the business's telecommunications equipment as to how to process and route those calls. Historically, customers have handled these functions internally, and such functions have not been subject to sales tax. Through the Cloud Collaboration Service Offering, [Company] will simply be providing these non-taxable functions as a service to its customers from an offsite location.

Specifically, the Cloud Collaboration Service Offering replaces certain customer-owned and maintained software applications and related computer hardware that support a customer's telecommunications

equipment with a [Company]-hosted alternative. In this hosted alternative, [Company] owns (or is the lessee or licensee of) and maintains certain hardware and software. The benefit of the Cloud Collaboration Service Offering is that customers can utilize the hardware and software Cloud applications on an as-needed basis from [Company], thereby reducing the customer's capital investment and on-going technology support and maintenance expenditures for such systems. The customer utilizes the hosted applications by means of the customer's existing telecommunications, Internet, or network connections, for which it pays its own third party telecommunications provider. In essence, in exchange for a monthly fee, [Company] will operate back-office equipment and software applications that provide necessary or enhanced functionality for a customer's phone systems and other telecommunication equipment. The customer will provide the telecommunications equipment.

[Company] will acquire, operate and maintain all hardware and software necessary to provide the Services and ensure optimal performance. The hardware and software required for providing the Services will be installed on servers located in [Illinois]. [Company] employees based in [Illinois] will provide onsite professional services to maintain the hardware and software, and [Company] employees based in [Wisconsin] will remotely monitor performance, perform necessary adds, moves, changes, and deletions, and provide troubleshooting for issues that arise during performance.

The Manner in Which the Services Are Provided

The Services will be provided by [Company] on a remote basis through the use of [Company]-owned Cisco Unified Communications Manager ("CUCM") clusters located at a [Company] data center. The CUCM clusters will deploy a variety of available [Company]-owned, client software applications that are utilized by customer owned phones and workstations located at customer sites. As described further below, the applications generally provide the customer's telecommunication equipment with certain necessary or enhanced functionalities.

Customers will be responsible for providing connectivity of sufficient bandwidth between the customer's location and [Company]'s data center. [Company] relies on the customer's QoS-enabled, voice-grade Local Area Network and Wide Area Network over which it provides the Services throughout a customer's geographic locations. Connectivity to the Public Switched Telephone Network ("PSTN") is not included in the Cloud Collaboration Service Offering. All connections between the customer and [Company]'s data center are through a customer's existing or newly-order PSTN circuits, phone lines and Internet connections. The PSTN or other connections can reside throughout the customer locations, and are terminated in to the [Company] data center through customer-owned, [Company]-managed gateways. Customers are always the "customer of record" for any PSTN, Internet or other service for the transportation or transmission of messages or information; the applications do not transport or transmit messages or information. All customer communications with third parties are through customer-contracted PSTN connections that are not provided by [Company]. [Company]'s customers continue to communicate with third parties over the PSTN, and continue to pay their telecommunications provider the same charges and taxes for such capabilities, both before and after signing up for the [Company] Cloud Collaboration Service Offering. PSTN communications with third parties are never physically routed through [Company]'s data center equipment.

[Company] may also host and deploy certain customer-owned software applications that provide enhanced functionalities for a customer's phone system and other telecommunication equipment. Such hosted services are available as add-on services for additional fees (as described below), and are utilized by customers in the same manner as the [Company]-owned and hosted software applications.

Agreements and Monthly Charges

To purchase the Cloud Collaboration Service Offering, customers will enter into a contract with [Company] that includes a customer service order, a service description for the Offering, and a detailed pricing invoice. . .

Under the contract with a customer, [Company] will charge the customer a monthly user license fee [The fee is denominated as a "license" fee, but [Company] does not in fact license or lease any software or tangible personal property to the customer under the contract], calculated based on the number of users. The monthly fee covers the charges for hardware, software, virtual server instance charges, required storage charges, rack space charges, power and cooling charges, as well as monitoring the management charges, most moves-adds-changes and major version upgrades. To the extent the customer purchases add-on services (including the hosting of customer-owned software applications), separate fees are charged for each such service. Charges for maintenance and management of any customer-owned software applications are also

separately stated on the monthly invoice.

Description of the Services Provided by the Embedded Software Applications

As described above, the [Company]-owned software applications available through the Offering support a customer's own voice, video, messaging, presence, audio/web conferencing, and mobile capabilities. A brief description of the supporting services provided by the various applications is set forth below:

Voice. A [Company] server, utilizing the CUCM, communicates with the customer's voice gateway device (i.e., the customer-owned switch) to provide instructions to the customer's voice gateway device for the processing and routing of incoming and outgoing calls among the customer's phone extensions; the call is not routed through [Company]'s server. No end-to-end communication is ever routed through [Company]'s server. This CUCM system also supports a customer's other forms of communication to its IP end-points, media-processing devices, VoIP gateways, mobile devices, and multimedia applications, as generally described below. A diagram depicting these voice services is attached as Attachment B.

Video. Video is the technology of electronically capturing, recording, processing, storing, transmitting, and reconstructing a sequence of still images representing scenes in motion. Video utilizes components such as the Cisco IP end-points, Cisco Jabber desk-top clients, or purpose-built video endpoints such as the Cisco EX60/90 or larger units. The video support services will be provided by [Company]'s server through a CUCM cluster in the same manner as outlined above with respect to a customer's voice communication capabilities.

Messaging. When a customer phone extension does not answer an incoming call, the [Company] server, utilizing the CUCM, instructs the customer's voice gateway device to send the call to voicemail. The voice messages are then stored on the [Company] servers and available for the user to access and manage at his or her convenience. The voice messaging support services provided by the Cloud Collaboration Service Offering will allow users to access and manage voice messages stored on [Company]-owned servers in a variety of ways, using an email inbox, web browser, Cisco Unified IP Phone, Smartphones, and Cisco Jabber, among other components.

Presence. Presence support services are provided by [Company] through a Cisco Unified Presence application that provides users the ability to determine when colleagues are available. The Cisco Unified Presence application offers the flexibility of rich, open interfaces that allow enablement of instant messaging and rich, network-based presence for a wide variety of business applications. As is the case with respect to the other services, the customer's own communications equipment accesses the Presence application hosted on [Company]'s servers to utilize the presence capabilities.

Audio Conferencing. With respect to a customer's audio conferencing capabilities, [Company] supports a customer-owned Cisco router and the phone devices through its hosted CUCM, in a manner similar to that which is described above with respect to the voice support services.

Web Conferencing. Cisco's WebEx application is an optional, subscription-based component of the Offering. WebEx is a cloud-based web conferencing application that permits desktop sharing through a web browser with phone conferencing and video. WebEx operates through a user's computer or wireless device, an audio connection (either through the computer or through a phone), and a webcam (optional).

Mobility Services. [Company] supports a customer's mobile devices through use of the Cisco Jabber application. Mobile clients utilizing Cisco Jabber can place and receive calls over their own corporate wireless local area network and telephony infrastructure, using [Company]'s server to instruct the routing of calls, and essentially turns a mobile phone into another extension on the CUCM. [Company]'s server itself does not provide the routing for the call or otherwise function as a switch. No end-to-end communication is ever routed through [Company]'s server.

With respect to each of the support services described above, a customer utilizes the [Company]-owned and hosted software with its own equipment and through its own telecommunication, Internet or other network connection. At no time does the customer download or otherwise possess *[sic]* the software that is hosted by [Company]. In addition, [Company] does not provide the telecommunication, Internet or network connections necessary for the customer to utilize the Services. The net result is that the customer has done nothing more than out-source certain activities previously performed in-house that were never subject to sales tax.

DISCUSSION

Based on the foregoing facts, Company requests a ruling as to whether its product is a non-taxable service.

Pursuant to [IC 6-2.5-2-1\(a\)](#) and [IC 6-2.5-2-2\(a\)](#), sales tax is imposed on retail transactions made in Indiana. A retail transaction is defined in [IC 6-2.5-4-1\(b\)](#) as the transfer, in the ordinary course of business, of tangible personal property for consideration. [IC 6-2.5-4-1\(c\)](#) goes on to provide in pertinent part:

For purposes of determining what constitutes selling at retail, it does not matter whether:

...
(2) the property is transferred alone or in conjunction with other property or services . . .

"Tangible personal property" is defined in [IC 6-2.5-1-27](#) as:

. . . personal property that:

- (1) can be seen, weighed, measured, felt, or touched; or
- (2) is in any other manner perceptible to the senses.

The term includes electricity, water, gas, steam, and prewritten computer software.

Except for certain enumerated services, sales of services generally are not retail transactions and are not subject to sales or use tax. [45 IAC 2.2-4-2](#) clarifies the taxability of services as follows:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in [subsection (a)], the gross retail tax shall not apply to such transaction.

A unitary transaction is clarified in [45 IAC 2.2-1-1\(a\)](#) as follows:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Sales of specified digital products are also included in the definition of retail transactions. [IC 6-2.5-4-16.4\(b\)](#) provides that a person engages in making a retail transaction when the person (1) electronically transfers specified digital products to an end user; and (2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser. "Specified digital products," as currently defined by [IC 6-2.5-1-26.5](#), include only digital audio works (e.g., songs, spoken word recordings, ringtones), digital audiovisual works (e.g., movies), and digital books. Products "transferred electronically" are defined at [IC 6-2.5-1-28.5](#) to mean products that are "obtained by a purchaser by means other than tangible storage media."

Pursuant to Section 333 ("Use of Specified Digital Products," effective Jan. 1, 2010) of the Streamlined Sales and

Use Tax Agreement ("SSUTA," effective May 16, 2016), of which Indiana is a signatory, "A member state shall not include any product transferred electronically in its definition of 'tangible personal property.'" Pursuant to the same section of the SSUTA, "ancillary services," "computer software," and "telecommunication services" are excluded from the term "products transferred electronically."

In order to stay in conformity with the SSUTA, Indiana may not impose sales tax on a product transferred electronically by basing the product's taxability on inclusion of the product in the definition of tangible personal property. It is important to note that "ancillary services," "computer software," and "telecommunication services" are not restricted by the phrase "product transferred electronically." However, [IC 6-2.5-1-27.5\(c\)\(8\)](#) explicitly excludes ancillary services from the definition of telecommunication services, which are taxable under [IC 6-2.5-4-6](#). Accordingly, ancillary services are not subject to sales tax in Indiana.

Based on the foregoing, Indiana may impose sales tax on products transferred electronically only if the products meet the definition of specified digital products, pre-written computer software, or telecommunication services.

"Prewritten computer software" is defined in [IC 6-2.5-1-24](#) as follows:

Subject to the following provisions, "prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser:

- (1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software.
- (2) Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser.
- (3) If a person modifies or enhances computer software of which the person is not the author or creator, the person is considered to be the author or creator only of the person's modifications or enhancements.
- (4) Prewritten computer software or a prewritten part of the software that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software. However, where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such a modification or enhancement, the modification or enhancement is not prewritten computer software.

With regard to the taxability of remotely accessed software, the Department in Sales Tax Information Bulletin #8 (November 2011) provides the following guidance:

Prewritten computer software maintained on computer servers outside of Indiana also is subject to tax when accessed electronically via the Internet (i.e., "cloud computing"). The accessing of prewritten computer software by Indiana residents constitutes a transfer of the software because the customers gain constructive possession and the right to use, control, or direct the use of the software.

"Telecommunication services" is defined in [IC 6-2.5-1-27.5](#) as follows:

- (a) "Telecommunication services" means electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points.
- (b) The term includes a transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing regardless of whether the service:
 - (1) is referred to as voice over Internet protocol services; or
 - (2) is classified by the Federal Communications Commission as enhanced or value added.
- (c) The term does not include the following:
 - (1) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information.
 - (2) Installation or maintenance of wiring or equipment on a customer's premises.
 - (3) Tangible personal property.
 - (4) Advertising, including but not limited to directory advertising.
 - (5) Billing and collection services provided to third parties.
 - (6) Internet access service.
 - (7) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of the services by the programming service provider. Radio and television audio and video programming services include cable service as defined in 47 U.S.C.

- 522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 CFR 20.3.
- (8) Ancillary services.
- (9) Digital products delivered electronically, including the following:
 - (A) Software.
 - (B) Music.
 - (C) Video.
 - (D) Reading materials.
 - (E) Ring tones.

"Ancillary Services" is defined in [IC 6-2.5-1-11.3](#) as follows:

"Ancillary services" means services that are associated with or incidental to the provision of telecommunication services, including the following:

- (1) Detailed telecommunications billing.
- (2) Directory assistance.
- (3) Vertical services.
- (4) Voice mail services.

The question is whether Company's "Cloud Collaboration Service Offering" product is a service that includes a transfer of prewritten computer software, specified digital products, or other tangible personal property. As explained above:

The Services will be provided by [Company] on a remote basis through the use of [Company]-owned Cisco Unified Communications Manager ("CUCM") clusters located at a [Company] data center. The CUCM clusters will deploy a variety of available [Company]-owned, client software applications that are utilized by customer owned phones and workstations located at customer sites. . . . [T]he applications generally provide the customer's telecommunication equipment with certain necessary or enhanced functionalities.

.. .

[Company] may also host and deploy certain customer-owned software applications that provide enhanced functionalities for a customer's phone system and other telecommunication equipment. Such hosted services are available as add-on services for additional fees (as described below), and are utilized by customers in the same manner as the [Company]-owned and hosted software applications.

Customers have to use their own telecommunication and Internet connections in order to use the Offering. However, Company does not appear to transfer any "prewritten computer software," "specified digital products," or other type of "tangible personal property" as a part of the "Cloud Collaboration Service Offering" product. Further, the hardware and software Company purchases, leases, or licenses from third parties is never transferred to its customers. A customer may use their own equipment, hardware, software, or other tangible personal property in order for Company's services to be rendered, but Company does not transfer any such items for consideration or as a part of the "Cloud Collaboration Service Offering" product. Customers also do not download the software on Company's servers as part of Company's Offering services. The software is never transferred to their customers, and customers never possess, control, or hold title in the software. The software remains on Company's servers in Illinois, and are used by Company to perform functions described above. The hardware is likewise kept in Illinois. Therefore, the software and hardware would be for Company's own use and consumption in providing its services, and would not be considered purchased with the intention for resale (thus it would not be exempt from Indiana sales tax if purchased by Company in Indiana under [IC 6-2.5-5-8](#)).

Applying the serviceperson test found at [45 IAC 2.2-4-2\(a\)](#), Company satisfies all of the requirements for finding that the services provided by Company are non-taxable. First, Company is primarily in the business of providing telecommunication supporting services, and not selling tangible personal property. [45 IAC 2.2-4-2\(a\)\(1\)](#). Second, the software and hardware is for the purpose of supporting telecommunication functions incident to Company's telecommunication supporting services. [45 IAC 2.2-4-2\(a\)\(2\)](#). Third, Company does not charge for the software or hardware, so it would be considered inconsequential compared to the overall service fee. [45 IAC 2.2-4-2\(a\)\(3\)](#). Fourth, regarding whether Company paid sales or use tax for the software or hardware it uses incident to its services, the purchases were made in Illinois, and were subject to Illinois sales or use tax. [45 IAC 2.2-4-2\(a\)\(4\)](#).

Company's "Cloud Collaboration Service Offering" product appears to be a service under [45 IAC 2.2-4-2](#), and not a sale, lease, license, or other transfer of software or other tangible personal property. Additionally, the "Cloud

Collaboration Service Offering" product would not meet the definition of a "telecommunication service," which again is defined in as "electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points." Company is not transmitting, conveying, or routing information, although it does enhance telecommunication services and equipment that are provided by a third party or the customer. Further, it appears that the services are not performed in Indiana (whether they are performed in Illinois or Wisconsin is another matter, and not relevant for the Department to determine, since the services are not taxable in Indiana).

Customers pay a monthly fee, calculated based on the number of users. These charges cover:

. . . hardware, software, virtual server instance charges, required storage charges, rack space charges, power and cooling charges, as well as monitoring the management charges, most moves-adds-changes and major version upgrades. To the extent the customer purchases add-on services (including the hosting of customer-owned software applications), separate fees are charged for each such service. Charges for maintenance and management of any customer-owned software applications are also separately stated on the monthly invoice.

The "detailed pricing invoice" does contain separately stated charges, but they all appear to be for services.

Based on the information provided, the "Cloud Collaboration Service Offering" is not subject to sales or use tax, as it is a service and does not constitute or include sales of tangible personal property, specified digital products, prewritten computer software, or telecommunication services.

RULING

Company's "Cloud Collaboration Service Offering" product is a service as enumerated in [45 IAC 2.2-4-2](#), is not a "telecommunication service," and is therefore not subject to Indiana sales and use tax. The hardware and software purchased, leased, or licensed by Company is for its own consumption incident to this service and not for resale.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

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